Supreme Court, U.S.
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No. 01-1065

IN THE

Supreme Court of the United States

JAYANTI S. PATEL,

Petitioner,

v.

THE CITY OF EVERMAN and TOM KILLEBREW,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether proof that an Indian-American individual's buildings were ordered demolished pursuant to a facially neutral ordinance, while buildings owned by Caucasians were not, without direct or circumstantial evidence of discriminatory intent, is sufficient to show a violation of the Equal Protection Clause of the Fourteenth Amendment.

2. Whether the lower courts properly applied *Arlington Heights* to Petitioner's case claims.

3. Whether this Court has sufficiently defined the burden for demonstrating a violation of the Equal Protection Clause of the Fourteenth Amendment in an "official action" case.

4. Whether the burden-shifting paradigm defined in *McDonnell Douglas v. Green*, for Title VII employment discrimination cases based upon circumstantial evidence, should be applied to "official action" cases.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the Petition for Writ Certiorari. The lower courts properly applied *Arlington Heights* to the facts at bar. More specifically, *Arlington Heights* sufficiently addresses a plaintiff's burden for demonstrating violations of the Equal Protection Clause of the Fourteenth Amendment. The holding in *Arlington Heights* is squarely in accord with Supreme Court and court of appeals precedent regarding non-employment invidious discrimination claims pursuant to the Equal Protection Clause of the Fourteenth Amendment.

STATEMENT OF JURISDICTION

Although this Court has jurisdiction to hear this matter pursuant to 28 U.S.C. § 1254(1), it should not exercise such jurisdiction because Petitioner alleges only that the lower courts misapplied a properly stated rule of law.

STATEMENT OF THE CASE

Petitioner owned twenty (20) properties in the Willow Wood Apartments Complex in the City of Everman, County of Tarrant, Texas. On April 9, 1997, the City of Everman Planning & Zoning Commission held public hearings on fifteen (15) rental properties owned by Petitioner and ordered the demolition of the buildings. On April 22, 1997, the Everman City Council held a Special Meeting to hear an Appeal of the Order to demolish Petitioner's structures. After examining the evidence and hearing testimony from Petitioner, the City Council unanimously passed a resolution accepting the Planning and Zoning Commission's recommendation to demolish fifteen (15) of the apartment buildings owned by Petitioner. Thereafter, Petitioner filed

Jayanti Patel v. City of Everman, Cause No. 48-169805-97, in the 48th Judicial District Court, Tarrant County, Texas. On September 17, 1997, the Court, in that action, entered an Agreed Order, signed by and agreed to by the parties, requiring Petitioner to bring fifteen (15) apartment buildings into compliance with all city codes of the City of Everman. The Agreed Order enjoined the City from demolishing any of the buildings until February 9, 1998. After the expiration of the Agreed Order, the City was allowed to demolish the apartment buildings without further court action.

On or about January 22, 1998, Respondent City employed the services of Respondent Killebrew, a Certified Building Official and owner of Metro Code Analysis, to address the substandard condition of the subject properties owned by Petitioner. At the time of the hiring of Killebrew, Respondent City did not have a Certified Building Official on its regular staff. On or about February 5, 1998, Respondent City enacted an amended Substandard Building Ordinance, which provided for a Building Board of Appeals and updated procedures for addressing substandard structures, as authorized by Texas Local Government Code § 214.001 *et seq*. Thereafter, in January 1998, Respondent Killebrew viewed Petitioner's properties and issued notices identifying violations of the Building, Mechanical, and Electrical Codes. Subsequent to this notice, Respondent Killebrew informed Petitioner during a telephone conversation that he would need to come to the City and take out permits for the necessary work to bring the subject properties into compliance. Petitioner never took these steps.

On or about February 20, 1998, Respondent Killebrew, accompanied by the City's Code Enforcement Officer and Chief of Police, performed an inspection of the twenty (20) subject properties and found that Petitioner's properties were

substandard under the City of Everman Code. Respondent Killebrew prepared inspection report for each property detailing the substandard conditions and provided Petitioner with copies of said reports. On or about February 20, 1998, Respondent City notified Petitioner of a public hearing before the Building Board of Appeals concerning the continuing substandard condition of all twenty (20) apartment buildings and the right to demolish the buildings if there are still code infractions after February 9, 1998 pursuant to the Agreed Order in *Jayanti Patel v. City of Everman*, Cause No. 48-169805-97. Respondent City emphasized that by holding said hearings, it was not waiving the right to enforce its rights under the Agreed Order signed by the parties.

On March 5, 1998, Respondent City held separate Building Board of Appeals hearings regarding each of the twenty (20) apartment buildings. Petitioner, and his attorney attended only three (3) of the twenty (20) hearings and did not present: (a) evidence demonstrating that Petitioner had abated the code violations at issue; (b) photographs reflecting the condition of Petitioner's properties at issue; (c) diagrams or charts reflecting the condition of Petitioner's properties; (d) evidence demonstrating that Petitioner had a plan to abate the code violations in questions; (e) witnesses to testify regarding the condition of Petitioner's properties; or (f) evidence concerning the apartment buildings' condition. On or about March 6, 1998, the Building Board of Appeals issued orders for the demolition of Petitioner's buildings. Notably, although Respondent Killebrew recommended that Petitioner's buildings should be demolished, only the Building Board of appeals had the authority to issue an order to demolish Petitioner's substandard buildings.

On or about April 3, 1998, Petitioner filed *Jayanti Patel v City of Everman*, Cause No. 352-173265-98, in the 352nd Judicial District Court, Tarrant County, Texas. In this action, Petitioner sought to enjoin the City from demolishing the subject buildings. On or about April 16, 1998, the 352nd Judicial District Court, after a hearing, entered an Order denying the Petitioner's Motion for Temporary Injunction, clearing the way for demolition of the subject properties. Thereafter, Respondent City commenced the demolition of eighteen (18) of the twenty (20) apartment units. On or about July 23, 1999, Petitioner's Cause No. 352-173265-98 in the 352nd Judicial District Court was non-suited by Petitioner on the day scheduled for trial.

On or about November 29, 1999, Petitioner filed Cause No. 4:99-CV-0982-BE in the United States District Court for the Northern District against Defendants City, Killebrew, (Respondents herein) and Metro Code Analysis asserting causes of action under 42 U.S.C. § 1983 for the deprivation of the protections of Fourth, Fifth and Fourteenth Amendments of the United States Constitution. On or about January 3, 2001, the United States District Court granted Summary Judgment in favor of Defendants City and Killebrew, who are Respondents herein, and issued final judgment regarding Petitioner's claims against Defendants. On or about October 22, 2001, the United States Court of Appeals for the Fifth Circuit affirmed the United States District Court's decision to grant Respondent City's summary judgment regarding Petitioner's claims.

SUMMARY OF ARGUMENT

The case at bar surrounds Petitioner's allegations of discrimination based on national origin. More specifically, Petitioner alleges that Respondents took the "official action"

of demolishing Petitioner's buildings because of his Indian origin and that said action violated his rights under the Equal Protection Clause of the Fourteenth Amendment. Importantly, this Court has consistently held that a plaintiff must make some showing of discriminatory intent or purpose to succeed with a discrimination claim under the Equal Protection Clause. Thus, a plaintiff must demonstrate, through direct and/or circumstantial evidence, an intent to discriminate against a suspect class to establish a violation of the Equal Protection Clause. A mere showing that a protected-class individual is subject to a different "official action" than a Caucasian individual, without direct or circumstantial evidence of discriminatory intent, is never sufficient to demonstrate a violation of the Equal Protection Clause of the Fourteenth Amendment.

Petitioner argues that the lower courts inappropriately considered *Arlington Heights* because said case fails to: (1) distinguish between allegations of disparate treatment and disparate impact; and (2) define a *prima facie* case for discrimination under the Equal Protection Clause. As referenced above, this Court's precedent does not recognize "disparate impact" claims under the Equal Protection Clause; therefore, there was no need for the *Arlington Heights* court to distinguish said claims from "disparate treatment" claims. Moreover, referencing the need for either direct or circumstantial evidence, *Arlington Heights* sufficiently defines the burden for a plaintiff to prove an invidious discrimination case under the Equal Protection Clause of the Fourteenth Amendment and outlines various "*prima facie*" factors the lower courts may consider in determining whether a violation of the Equal Protection Clause has occurred. Although decided in 1976, *Arlington*

Heights is good law and has been consistently applied to "official action" claims of discrimination under the Equal Protection Clause of the Fourteenth Amendment.

Petitioner further argues that the burden-shifting framework defined in *McDonnell Douglas v. Green* for Title VII employment discrimination cases should be applied to Petitioner's "official action" discrimination claim. Due to the different purposes behind Title VII and the Equal Protection Clause of the Fourteenth Amendment, the analysis used for Title VII employment discrimination cases is inappropriate for "official action" claims of discrimination. Furthermore, this Court has never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable in Title VII.

Notwithstanding, even under *McDonnell Douglas v. Green*, a plaintiff always has the burden of demonstrating that discriminatory intent was the reason for a defendant's actions. Petitioner argues that if the lower courts had applied the burden-shifting paradigm defined in *McDonnell Douglas v. Green*, Petitioner would have had the opportunity to develop fully his circumstantial evidence of discriminatory motive and to test the credibility of the City's non-discriminatory motive. Simply stated, that would not be the result of applying *McDonnell Douglas v. Green* to the facts at bar. Specifically, all employment discrimination precedent emphasizes that the burden to show discriminatory intent always remains with the plaintiff. Even in the context of summary judgment, it is a plaintiff's burden to show that the legitimate non-discriminatory reasons offered by a defendant for its actions are pretext for protected-class discrimination.

Thus, Petitioner's assumption is misplaced and Petitioner's claim would have failed even applying *McDonnell Douglas v. Green*.

REASONS FOR DENYING THE WRIT

I. The Difference Between the Claims under Title VII and the Equal Protection Clause

Petitioner mischaracterizes and misplaces the foundation of "disparate treatment" cases and "disparate impact" cases. Although the Title VII "disparate treatment" and "disparate impact" theories of discrimination are inapplicable to a claim of discrimination under the Equal Protection Clause, an understanding of the two (2) theories is helpful in analyzing the issues raised in Petitioner's Petition for Writ of Certiorari.

A. Employment Discrimination Claims pursuant to Title VII

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430, 91 S. Ct. 849, 853 (1971). Pursuant to the language of Title VII, there are two (2) types of employment discrimination cases. More specifically, Title VII prohibits an employer from: (1) failing or refusing to hire, or discharging any individual, or discriminating against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such an individual's race, color, religion, sex or national origin; and (2) limiting, segregating or classifying his employees or

applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of the individual's race, color, religion, sex, or national origin. *See* 42 U.S.C. § 2000e-2(a)(1) and (2). Accordingly, there are two (2) theories by which a complainant can prove an employment discrimination claim under Title VII.[1] The two theories being: disparate treatment and disparate impact.

1. Disparate Impact Cases: No Showing of Intent Required

As noted above, Title VII prohibits the implementation of procedures, practices, tests, or standards that have a discriminatory effect on protected classes. *See Griggs*, 401 U.S. at 429-30, 91 S. Ct. at 853. Claims based on said facts have been defined as "disparate impact" claims. Such claims are generally based on standards that appear to be neutral on their face, but that by their very institution have a discriminatory effect on employment opportunities for protected-class members. *See Griggs*, 401 U.S. at 429-30, 91 S. Ct. at 853. Generally, "disparate impact" cases deal with the effects of a neutral standard on a large group of protected-class members. A disparate impact case does not require a showing of discriminatory intent; therefore, with sufficient proof, an individual can prove a discriminatory impact case without providing any evidence of discriminatory motive or intent. *See Griggs*, 401 U.S. 424, 91 S. Ct. 849.

To establish a *prima facie* case of "disparate impact" discrimination, a plaintiff need only show that the facially

1. Title VII also prohibits retaliation against any individual that attempts or asserts his rights under Title VII. These cases are known as Title VII retaliation cases. 42 U.S.C. § 2000e-3(a).

neutral practice causes a disparate impact on the basis of a suspect class. *Griggs*, 401 U.S. at 431-33, 91 S. Ct at 853. Once it is shown that the standards are discriminatory in effect, the employer show that the employment standard has a manifest relationship to the employment in question. If the employer proves that the challenged requirements are job related, the plaintiff may then show that other selection devices without a similar discriminatory effect would also serve the employer's legitimate interest in efficient and trustworthy workmanship. *See* 42 U.S.C. § 2000e-2(k)(1); *see Griggs*, 401 U.S. at 433, 91 S. Ct. at 855; *Dothard v. Rawlinson*, 433 U.S. 321, 97 S. Ct. 2720, 53 L. Ed. 2d 786 (1977).

2. Disparate Treatment Cases: A Showing of Intent Required

Clearly, Title VII prohibits employment actions, such as hiring, firing, demoting or promoting, based on race, color, sex, religion, or national origin. *See* 42 U.S.C. § 2000e-2(a)(1). Allegations of intentional discrimination based on a protected class are referred to as "disparate treatment" claims. Disparate treatment cases require a showing of discriminatory intent through either direct or circumstantial evidence. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

There are two ways to prove a disparate treatment case, through circumstantial evidence and through direct evidence. The type of evidence offered by a plaintiff dictates the burden of proof for said case. Notably, to prove a disparate treatment case, it will never suffice to merely provide evidence that a

protected class member was treated differently than a non-protected class member. This is not sufficient because there is a plethora of reasons why two persons may not be treated the same; the case law defines a more reliable approach for determining whether intentional discrimination has occurred.

If a plaintiff attempts to offer direct evidence of discrimination to prove a "disparate treatment" case under Title VII, the plaintiff must provide sufficient evidence to show that a discriminatory motive played a role in the adverse employment action in question. *See* 42 U.S.C. § 2000e-2(m). If a plaintiff meets this burden, an employer can avoid damages at law by showing that he or she would have taken the same action despite the discriminatory motive. *See* 42 U.S.C. § 2000e-5(g)(2)(B). Without a showing of discriminatory motive or intent, a plaintiff cannot succeed in a "disparate treatment" case.

If a plaintiff offers only circumstantial evidence to prove a "disparate treatment" claim, the burden-shifting paradigm defined in *McDonnell Douglas v. Green* is applicable.[2] The elements of a plaintiff's *prima facie* case necessarily vary according to the facts of the case and the nature of the claim. *McDonnell Douglas*, 411 U.S. at 802, 935 S. Ct. at 1824. Notwithstanding, generally, to prove a *prima facie* case of discrimination through circumstantial evidence, a plaintiff must show: (1) he is a member of a protected class; (2) he has qualified for the position in question; (3) despite his qualifications, he was rejected; and (3) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant qualification. *McDonnell Douglas v. Green*, 411 U.S. at 802,

2. 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973).

93 S. Ct. at 1824. Importantly, a similar burden-shifting analysis is applied in adverse employment action cases, involving suspensions, terminations, demotions and the like. Once the plaintiff establishes a *prima facie* case of discrimination, the burden of production shifts to the employer to articulate legitimate, non-discriminatory reasons for the employment decisions at issue. *Burdine*, 450 U.S. at 254, 101 S. Ct. at 1094. If the employer proffers a legitimate, non-discriminatory reasons for its actions, the presumption of unlawful discrimination, created by the plaintiff's *prima facie* case, disappears. *See St. Mary's Honor Center*, 509 U.S. at 506-07, 113 S. Ct. at 2747. Thus, if the defendant has met its burden of production, "the *McDonnell Douglas* framework with its presumptions and burdens – is no longer relevant." *St. Mary's Honor Center*, 509 U.S. at 521, 113 S. Ct. at 2755. Thereafter, the plaintiff must prove that the employer's articulated reasons are a mere pretext for unlawful discrimination. *McDonnell Douglas*, 411 U.S. at 802-05, 93 S. Ct. at 1824-26; *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097, 2112 (2000). Importantly, the plaintiff retains the ultimate burden of persuasion throughout the case, and must show the employer intentionally discriminated against him. *Reeves*, 120 S. Ct. at 2106 (quoting *Burdine*, 450 U.S. at 253); *St. Mary's Honor Center*, 509 U.S. at 515. If that were not the case, any time a Hispanic or African-American employee was fired while a Caucasian employee was not, for whatever reason, one could demonstrate a *prima facie* case of employment discrimination. Such a result would burden and overwhelm the courts with litigation.

B. Discrimination Claims pursuant to the Equal Protection Clause of the Fourteenth Amendment

The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminatory on the basis of a suspect class. *See Washington v. Davis*, 426 U.S. 229, 239, 96 S. Ct. 2040, 2047 (1976). "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person with its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike." *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S. Ct. 3249 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216, 12 S. Ct. 2382, 2394, 72 L. Ed. 2d 786 (1982)). Although the purposes behind Title VII and the Equal Protection Clause of the Fourteenth Amendment are similar, they are not the same.

First, there is no protection under the Equal Protection Clause for discriminatory effects of a particular law or action. *See Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 99 S. Ct. 2282 (1979); *Washington v. Davis*, 426 U.S. at 239, 96 S. Ct. at 2047. The Equal Protection Clause of the Fourteenth Amendment provides for equal protection of the laws not equal results. *Feeney*, 442 U.S. at 273, 99 S. Ct. at 2293. Thus, the current case law does not provide for a cause of action for mere discriminatory effects of a particular action or law in the context of claims based on constitutional violations. *See Feeney*, 442 U.S. 256, 99 S. Ct. 2282; *Washington*, 426 U.S. at 239, 96 S. Ct. at 2047; *Wright v. Rockefeller*, 376 U.S. 52, 84 S. Ct. 603, 11 L. Ed. 512 (1964); *Akins v. State of Texas*, 325 U.S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692 (1945). Impact may provide a

starting point, but "purposeful discrimination is the condition that offends the Constitution." *See Feeney*, 442 U.S. at 274, 99 S. Ct. at 2293.

To demonstrate a violation of the Equal Protection Clause, a plaintiff must show that the "decision-maker selected or reaffirmed a particular course of action at least, in part, 'because of' not merely 'in spite of' its adverse effects upon an identifiable group." *See Feeney*, 442 U.S. at 279, 99 S. Ct. at 2296 (citation omitted); *McClesky v. Kemp*, 481 U.S. 279, 298, 107 S. Ct. 1756, 1770 (1987). Thus, if a suspect classification is not at issue, some showing of a discriminatory purpose toward a suspect class is required. "To hold otherwise, would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be." *Davis*, 426 U.S. at 240-41, 96 S. Ct. at 2048. Accordingly, Equal Protection Claims are similar to Title VII "disparate treatment" cases only to the extent that the both require a showing of discriminatory intent via direct or circumstantial evidence.

Moreover, unlike employment decisions, the reasons for an "official action" decision are generally privileged and the decision-maker(s) does not have an opportunity to explain their reasons for decision. *See United States v. Morgan*, 313 U.S. 409, 422 (1991); *United States v. Nixon*, 418 U.S. 683, 705, 94 S. Ct. 309, 3106 (1974); *Teeney v. Brandhove*, 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019 (1951). An analysis under Title VII "involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed." *Davis*, 426 U.S.

at 247-48, 96 S. Ct. at 2051. Specifically, one should not be given an opportunity to probe into the minds of administrators, legislators, or quasi-judicial fact finders unless the decision is shown to be arbitrary or irrational. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555 (1977). Accordingly, unlike personnel decisions that are clearly subject to judicial injury, there is a threshold one must meet before being permitted to question the decision-makers about the reasons for an "official action." Moreover, a plaintiff must demonstrate discriminatory purpose or intent to succeed with an Equal Protection Clause claim. As will be discussed below, the burden-shifting paradigm defined in *McDonnell v. Douglas* for employment discrimination cases based upon circumstantial evidence only is not a sufficient standard for demonstrating an invidious discrimination claim under the Equal Protection Clause.

II. *Arlington Heights* provides sufficient guidance for evaluating Equal Protection claims involving non-employment cases such as "official action" claims.

Petitioner argues that his buildings were demolished because of his national origin, Indian. Petitioner concedes that the ordinance upon which the Building Board of Appeals relied when ordering the demolition of his buildings is facially neutral. Petitioner argues that the case at bar is a "disparate treatment" claim under the Equal Protection Clause. As noted above, there is not a "disparate treatment" claim per se under the Equal Protection Clause.

A. *Arlington Heights:* Facts and Holding

Contrary to Petitioner's interpretation, *Arlington Heights* is not a "disparate impact" case. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555 (1977). Although the *Arlington Heights* plaintiffs pointed to evidence demonstrating that more suspect-class individuals would be affected by the "official action" in question, said plaintiffs did not allege that the facially neutral zoning law in question had a discriminatory impact on persons of a protected class. Moreover, there is no "disparate impact" claim per se under the Equal Protection Clause because a mere showing of the discriminatory effects of a particular action or law is insufficient to successfully prove a violation of the Equal Protection Clause.

In *Arlington Heights*, the plaintiffs below applied to the Village of Arlington Heights ("VILLAGE") for the rezoning of a 15-acre parcel from single-family to multiple-family classification. The Village denied the rezoning request and the plaintiffs filed suit alleging that the denial was racially discriminatory and that it violated, *inter alia*, the equal Protection Clause. Following a bench trial, the district court entered judgment for the Village and the Plaintiffs appealed. The Court of Appeals for the Seventh Circuit reversed, finding that the "ultimate effect" of the denial was racially discriminatory, and that the refusal to rezone therefore violated the Fourteenth Amendment. *Village of Arlington Heights*, 429 U.S. 254, 97 S. Ct. at 558. This Court granted the Village's petition for certiorari and reversed the lower court's finding.

In *Arlington Heights*, the Court considered whether evidence showing that an "official action" had a greater

impact on protected-class individual is sufficient to prove a violation of the Equal Protection Clause. In arriving to its decision, the United States Supreme Court emphasized the holding in *Washington v. Davis* which made it clear that an "official action" will not be held unconstitutional solely because it results in a racially disproportionate impact. The Court emphasized that "[d]isproportionate impact is not irrelevant, but is not the sole touchstone of an ambiguous rational discrimination." *Village of Arlington Heights*, 429 U.S. at 264-65, 97 S. Ct. at 563. Moreover, the Court explained that because legislators and administrators are properly concerned with balancing numerous competing considerations, the courts refrain from reviewing the merits of the decisions, absence a showing of arbitrariness or irrationality. *Village of Arlington Heights*, 429 U.S. at 265, 97 S. Ct. at 563. "But rational discrimination is just not another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified." *Village of Arlington Heights*, 429 U.S. at 265-66, 97 S. Ct. at 563. In summary, the Court held that the plaintiffs failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision. Moreover, the Court accentuated that a finding that the Village's decision resulted in a discriminatory "ultimate effect" is without independent Constitutional significance. *Village of Arlington Heights*, 429 U.S. at 270-71, 97 S. Ct. at 566.

B. *Arlington Heights* sufficiently defines a *prima facie* case and burden-shifting paradigm

This Court in *Arlington Heights* sufficiently defined a *prima facie* case and burden-shifting paradigm to be used for evaluating claims under the Equal Clause of the

Fourteenth Amendment. In fact, Petitioner relied on *Arlington Heights* below. In *Arlington Heights*, the Court suggests that when determining whether invidious discriminatory purpose was a motivating factor, the lower courts must demand "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available". *Village of Arlington Heights*, 429 U.S. at 266, 97 S. Ct at 564. By using the conjunctive, the Court is clear that a finding can be based on either type of evidence when said evidence is available. The Court noted that the impact of the official action whether it bears more heavily on one race than the other may provide an important starting point.

Furthermore, the Court, defined various "*prima facie*" factors that lower courts may consider in determining whether invidious discrimination has occurred in violation of the Equal Protection Clause. More specifically, the Court explained that the Court can look to the following evidence: (1) the historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes; (2) the specific sequence of events leading up to the challenge decision; (3) departures from the normal procedural sequence; and (4) the legislative or administrative history regarding the official decision at issue. *Village of Arlington Heights*, 429 U.S. at 267-68, 97 S. Ct. at 564-65. The Court further explained that if a plaintiff carries the burden to demonstrate some evidence, direct or circumstantial, indicating that discriminatory purpose was a motivating factor in the official decision, the burden would shift to the defendant to establish that the same decision would have resulted even if the impermissible purpose not been considered. *Village of Arlington Heights*, 429 U.S. at 268, 97 S. Ct at 564-65 (citing *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977).

C. Applying the burden-shifting paradigm defined in *Arlington Heights*, Petitioner has no remedy under the law

As noted above, the *Arlington Heights* Court defined various *prima facie* factors and a burden-shifting paradigm to be used in evaluating Equal Protection Claims under the Fourteenth Amendment claims. Thus, the lower courts properly applied *Arlington Heights* to the case at bar. Applying said factors, the lower courts did not find that Petitioner had established any evidence of a discriminatory intent on the part of the Respondents. See Petitioner's Appendix pgs. A1-A14. Petitioner argues that the very fact that he was treated differently than other individuals who were Caucasian should be sufficient evidence to demonstrate a violation of the Fourteenth Amendment. Clearly, said evidence is not sufficient evidence to prove a claim pursuant to the Equal Protection Clause or Title VII. Considering the evidence provided by Petitioner and the factors defined in *Arlington Heights*, the Petitioner has no remedy at law because he can not prove that discriminatory motive or intent was the reason, or even a motivating factor, for the City of Everman Building Board of Appeals' decision to demolish his properties.

As the lower court below noted, Petitioner and Respondents had years of disputes regarding the substandard condition of Petitioners buildings in which no reference or indication of rational animus appeared. Additionally, the evidence demonstrates that many attempts were made to reach a resolution before demolition of buildings was ordered. Finally, there was no evidence the City's Building Board of Appeals departed from its general procedures for enforcement of the City's Ordinance. Of all the evidence provided by

Petitioner, none is sufficient to establish that discriminatory motive or intent played a role in the decision to demolish Petitioner's property. Moreover, the lower courts properly relied upon *Arlington Heights* in reaching their decisions.

III. The burden-shifting paradigm defined in *McDonnell Douglas v. Green* for Title VII employment discrimination cases is inappropriate for cases involving allegations of discrimination with regard to "official actions"

Although the *McDonnell Douglas* paradigm provides for a presumption of discrimination after proof of a *prima facie* case, the ultimate burden remains with the plaintiff to show that intentional discrimination was reason for the employment action at issue. "The *McDonnell Douglas* presumption is a procedural device, designed only to establish an order of proof and production." *St. Mary's Honor Center*, 509, U.S. at 521, 113 S. Ct. at 2755. "Although intermediate evidentiary burdens shift back and forth under said framework, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Reeves*, 530, U.S. at 143, 120 S. Ct. at 2106 (internal questions omitted). In the "official action" case at bar, the *McDonnell Douglas* framework is inappropriate for official action cases because it is nothing more than an allocation of order of proofs and burdens for Title VII cases. Moreover, it is not necessary given the elaborate framework defined for "official action" cases in *Arlington Heights*.

Petitioner argues that if the *McDonnell Douglas* burden-shifter paradigm had been applied to his claim, he would have had the opportunity to test the credibility of the

Respondents' reasons for their actions and would have had a chance to develop a showing of pretext. Clearly, it would have been Petitioner's burden, even at the summary judgment stage, to ultimately persuade the Court that intentional discrimination was the reason for the demolition of Petitioner's buildings. *Anderson v. Liberty Lobby, Inc.*, 477U.S. 242, 252 (1986). Accordingly, Petitioner would still have had to show Respondents City and Killebrew acted with the intent to discriminate on the basis of Petitioner's national origin.

Finally, Petitioner argues that he provided evidence of pretext when he demonstrated that Respondent Killebrew was not credible and/or that the reasons provided by Respondent Killebrew were false. Importantly, this Court has consistently emphasized that the under the *McDonnell Douglas* burden-shifting framework only the burden of **production** shifts the defendant to articulate a legitimate non-discriminatory reason for its action. This Court has stated that "the determination that a defendant has met its burden of persuasion (and has thus rebutted an illegal presumption of intentional discrimination) can involve no credibility assessment." *St. Mary's Honor Center*, 509 U.S. at 509, 113 S. Ct. at 2748. Accordingly, Petitioner's arguments fail, that is "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination . . ." *Reeves*, 530 U.S. at 147, 120 S. Ct. at 2108. Moreover, the evidence provided by Petitioner regarding "pretext" refers to alleged actions by Respondent Killebrew. Importantly, as noted above, Respondent Killebrew, as the City's Building Official, merely recommended the demolition of Petitioner's buildings. Specifically, the City of Everman Building Board of Appeals is the only entity with the authority to issue an order regarding

the demolition of Petitioner's buildings. According, assuming the allegations provided by Petitioner are correct, they bid no support to an argument that the Building Board of Appeals issued the orders of demolition due to Petitioner's national origin. Therefore, even under the *McDonnell Douglas* framework, Petitioner has no legal remedy at law and has not survived the burden established under the employment discrimination context.

Finally, this Court has never applied the Title VII analysis to constitutional violations and should not do so now. *Washington*, 426 U.S. at 239, 96 S. Ct. at 2047. As explained above, this Court has sufficient defined a burden-shifting approach and various factors for evaluating alleged constitutional violations. There is no need to provide additional explanation for the purposes of Petitioner's claim.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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